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No. 01-1289

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

v.

CURTIS B. CAMPBELL AND INEZ PREECE CAMPBELL,
Respondents.

On Writ Of Certiorari
To The Utah Supreme Court

BRIEF OF FORD MOTOR COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus will address the following questions:

1. Whether the United States Constitution allows a state court to impose and inflate punitive damages based on the defendant's purely out-of-state conduct or its aggregate worldwide "wealth" and profits.

2. Whether the United States Constitution requires that juries be instructed on the federal constitutional limitations on their ability to assess punitive damages.

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BRIEF OF FORD MOTOR COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

The questions presented by this case are not unique to State Farm or the insurance industry. Virtually all large corporations are vulnerable to arbitrary and excessive punitive damage awards when juries are permitted to impose punishment based on the corporation's alleged out-of-state conduct that has no impact on in-state residents, or on the corporation's aggregate worldwide "wealth" and profits.

Ford Motor Company is no exception. State courts routinely permit juries to consider Ford's "nationwide" business activities and the company's total revenues in determining punitive damages, even when the lawsuit concerns a single accident involving a single vehicle. Indeed, these problems are particularly acute for automobile manufacturers, whose mass-produced products are sold and used in all fifty States, and whose overall revenues are routinely invoked by plaintiffs' lawyers to argue that only a punitive damage award of hundreds of millions of dollars will suffice to "get the company's attention," regardless of the facts of the case.

The laws of most States provide for only skeletal jury instructions regarding how juries should determine punitive damages. Unaware of any restraints, constitutional or otherwise, on their discretion, juries often respond by imposing massive punitive damage awards based on a company's national and international business activities and revenues. Such punishments bear no relation to the alleged wrongdoing and are imposed without regard to the constitutional limitations on punitive damage awards. *See BMW of North Amer-*

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, Ford states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than Ford or its counsel made a monetary contribution to the preparation or submission of this brief.

ica, Inc. v. Gore, 517 U.S. 559 (1996) (recognizing that Due Process and Commerce Clauses prohibit extraterritorial punishment, and identifying three "guideposts" to determine whether punitive damage award was unconstitutionally excessive).

The following recent examples illustrate the arbitrariness that results when juries are left without guidance.

In *Romo v. Ford Motor Co.*, 99 Cal. App. 4th 1115 (Ct. App. 2002) (petition for review pending), the court reinstated a $290 million punitive damage verdict that the trial judge had set aside on juror misconduct grounds as "fundamentally suspect." The verdict arises from a single accident involving a 1978 Ford Bronco that surpassed by 100 percent the relevant federal safety standards. In reinstating and then upholding the $290 million punishment, which exceeds by over $286 million the largest prior punitive damage award ever affirmed on appeal in California in a published product liability decision, the court expressly based the award on Ford's alleged conduct in other States. The court swept aside any constitutional limitations on its jurisdiction by reasoning that "the interest California seeks to protect—individual human lives—is neither unique to California nor limited to its own citizens." *Id.* at 1151 & n.3. The court also swept aside the *BMW* excessiveness guideposts—even pronouncing one of them "inapplicable"—and justified its refusal to apply *BMW* by stating that Ford had been given constitutionally-mandated "fair notice" of a $290 million punitive damage award because it "is a huge company with enormous monetary resources" and should have known that "California regards it as necessary to impose penalties related to the wealth of the defendant." *Id.* ~~at~~ 1149, 1152. The court also held that it was appropriate for California to impose a punishment in this one case of nearly three times the *total profits* that Ford made *worldwide* on sales of the vehicle. *Id.* at 1149.

Similarly, in *Sand Hill Energy, Inc. v. Ford Motor Co.*, No. 1999-SC-1028-SG, 2002 WL 1000917 (Ky. May 16, 2002), the trial court rejected Ford's request for jury instruc-

tions concerning the purposes of punitive damages and the constitutional limitations on such awards.[2] Left without guidance on the most basic limitations on punitive damages, the jury proceeded to impose a $20 million punitive award. The intermediate appellate court set aside the award, but the Kentucky Supreme Court reinstated the verdict, reduced the amount to $15 million, upheld Kentucky's "venerated practice" of "the giving of 'bare-bones' instructions," even when a defendant's constitutional rights are at stake, and held that Ford had "fair notice" of a substantial award simply because it is "a multi-national corporation" that "possesses a wealth of information as to settlements, verdicts, and trial and appellate court decisions." *Id.* at *7, *9.

And in *White v. Ford Motor Co.*, (D. Nev. 1999) (appeal pending, 9th Cir., No. 99-15185), the plaintiffs' lawyer repeatedly invoked Ford's alleged wealth at trial, introduced a financial statement supposedly showing that Ford had a net worth of $30 billion, and urged the jury to punish Ford on behalf of purported "victims across the country" and "families across the country." In response, Ford requested that the jury be instructed that it could not consider Ford's alleged out-of-state activities, and that any punitive damage award must be reasonably related to the $1.4 million compensatory award. The trial court denied the instructions and the jury

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[2] Ford requested that the jury be instructed that "the purpose of punitive damages is not to award the [plaintiff] a windfall, but to punish [the defendant] for its misconduct and to deter [the defendant] and others from similar conduct in the future"; that "[i]n determining the amount of punitive damages that is necessary for punishment and deterrence, you may consider only [the defendant's] wrongful conduct that has, or has had, an impact on the citizens of Kentucky"; that "[y]ou may not award any punitive damages for the purpose of punishing [the defendant] relative to the sales of vehicles in other states, or for the purpose of changing [the defendant's] conduct outside the state of Kentucky"; and that the defendant's "wealth, size or financial condition should play no part in a jury's determination of the amount of punitive damages that should be awarded."

imposed over $150 million (later remitted to $69 million) in punitive damages.

Ford's experience is no different from that of other automobile manufacturers, who routinely face the possibility of being punished by a court in one State for their alleged conduct in other States—and then having the award multiplied exponentially to reflect their purported wealth and overall profits. *See, e.g.*, *Jimenez v. DaimlerChrysler Corp.*, 74 F. Supp. 2d 548 (D.S.C. 1999) (upholding $250 million punitive damage award based on DaimlerChrysler's net worth and alleged conduct in other States, and rejecting extraterritoriality argument on grounds that "the conduct at issue was improper in all states"), *reversed for insufficiency of evidence*, 269 F.3d 439 (4th Cir. 2001); *Anderson v. General Motors Corp.*, No. BC116926 (Cal. Super. Ct., Los Angeles County, Aug. 26, 1999) (reducing the jury's punitive damage award from $4.8 *billion* to $1.09 billion, and justifying that amount by reasoning that GM "possessed information of its financial condition, putting it on notice that it might face an award as large as the one in this action") (appeal pending).

These cases typify how evidence of a manufacturer's nationwide business practices and aggregate wealth is misused to persuade juries that ordinary traffic accidents warrant the imposition of multimillion or, in some cases, multi*billion*-dollar punitive damage awards. Even though the manufacturer's business practices are almost always lawful where performed, and even though only an exceedingly small fraction of the manufacturer's overall wealth could possibly have resulted from the specific misconduct alleged in the complaint, plaintiffs' lawyers improperly leverage evidence of the manufacturer's alleged out-of-state practices to transform their case into one of purportedly "nationwide" significance warranting a commensurately "nationwide" punitive damage award. Because manufacturers ordinarily are not permitted to put the allegations of out-of-state misconduct to the test—because to do so would lead to multiple "mini trials" on collateral issues—the net result is that assertions of out-of-state misconduct are often credited, and leveraged into multimil-

lion-dollar punishments, on the basis of the most minimal evidentiary showings, often amounting to little more than plaintiffs' counsel's say-so.

Consequently, Ford has a substantial interest in addressing two fundamental questions posed by this case: whether the Constitution allows a state court to impose punitive damages based on the defendant's out-of-state conduct and overall national profits; and whether the Constitution requires that juries be instructed on the federal constitutional limitations on their ability to assess punitive damages.

STATEMENT

Plaintiffs Curtis and Inez Campbell sued Mr. Campbell's insurer, State Farm, in Utah state court for declining to settle third-party claims against Mr. Campbell arising from his involvement in an automobile accident. The trial was bifurcated. In the first phase, the jury found that State Farm's decision not to settle within policy limits was unreasonable because there was a substantial likelihood of an excess judgment against Mr. Campbell. Pet. App. 6a.

The jury considered the plaintiffs' punitive damage claim in the second phase. Although State Farm moved *in limine* to exclude evidence of alleged conduct that occurred outside of Utah, the trial court denied the motion. Pet. 2. The plaintiffs proceeded to introduce large amounts of evidence of State Farm's alleged extraterritorial conduct, including evidence supposedly showing State Farm's business practices in other States. *Id.* at 3-5. The plaintiffs portrayed this alleged out-of-state conduct, the vast majority of which had no bearing on Utah or its citizens, as part of a purported nationwide "scheme" to reduce claims payouts. *Id.* at 3. The plaintiffs also introduced evidence they claimed showed State Farm's overall "wealth" and nationwide profits. Pet. App. 17a.

The plaintiffs expressly based their claim for punitive damages on State Farm's alleged out-of-state conduct. In his opening statement during the trial's second phase, counsel

for plaintiffs argued that this case "transcends the Campbell file" because it "involves a nationwide practice." Pet. 3. He then asked the jury to punish State Farm for its business practices in other States, telling the jurors that they were "going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable *for what it's doing across the country*, which is the purpose of punitive damages." *Id.* (emphasis added).

The jury awarded the plaintiffs $2.6 million in compensatory damages and $145 million in punitive damages. Pet. App. 7a. State Farm moved for remittitur, arguing that the punitive damage award was unconstitutional because it improperly punished out-of-state conduct and was excessive under *BMW*. The trial court reduced the compensatory award to $1 million and cut the punitive award to $25 million. *Id.*

Both parties appealed. The Utah Supreme Court held that the trial court erred in remitting the punitive damages award, and it reinstated the jury's $145 million verdict. *Id.* at 76a-77a. In canvassing the evidence supporting the award, the court noted that "the trial court allowed the Campbells to introduce extensive expert testimony regarding fraudulent practices by State Farm in its nation-wide operations," and underscored the trial court's finding that "State Farm is an enormous company with massive wealth." *Id.* at 6a, 30a.

SUMMARY OF ARGUMENT

The $145 million punitive damages award, which was based on State Farm's alleged out-of-state conduct and national profits, violates the Due Process and Commerce Clauses of the United States Constitution. By resting the award on State Farm's purported conduct in States other than Utah, the court below disregarded the clear teaching of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and infringed on the right of sister States to adopt their own public policies and enforce their own penal laws. The court further erred by using State Farm's *overall* wealth and profits as a means of calculating the amount of the punitive award, even

though only a small percentage of those profits could have resulted from the alleged misconduct.

This Court should reaffirm the constitutional limitations on punitive damage awards, and should make clear that juries—who make the decision to impose punitive damages in the first instance—must be instructed on the limitations that the United States Constitution places on their ability to award such damages. This Court has recognized that punitive damages "pose an acute danger of arbitrary deprivation of property," *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994), and that proper jury instructions are an effective way of avoiding arbitrary decisions and protecting a defendant's constitutional rights. Juries should be specifically instructed on the purpose of punitive damages, and on the ways in which the Constitution limits their consideration of evidence concerning the defendant's out-of-state conduct and financial status.

ARGUMENT

I. THIS COURT SHOULD REAFFIRM AND CLARIFY THE CONSTITUTIONAL LIMITS ON PUNITIVE DAMAGE AWARDS

The decision below runs roughshod over basic principles of federalism and defies the constitutional limits on punitive damage awards that this Court recognized in *BMW*. By punishing State Farm for its alleged conduct in other States, the Utah Supreme Court violated the Commerce and Due Process Clauses, and encroached on the autonomy of other States to determine their own policies and enforce their own penal laws. Moreover, by predicating the amount of the punitive damage award on State Farm's purported national "wealth," the Utah court effectively jettisoned the constitutionally-mandated *BMW* analysis and imposed a massive punishment that bears no relation to the specific misconduct alleged in this lawsuit.

A. The Constitution Bars States From Punishing Out-Of-State Conduct

1. The Constitution of the United States enshrines the bedrock principle that "[n]o State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). Consequently, a State's laws are "presumptively territorial and confined to limits over which the law-making power has jurisdiction." *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918). Both the Commerce Clause and the Due Process Clause protect state autonomy by generally prohibiting each State from punishing or regulating conduct occurring within the jurisdiction of sister States.

This Court has applied these principles in a variety of contexts. Recognizing that the Commerce Clause acts as "a limitation upon the power of the States," *Freeman v. Hewit*, 329 U.S. 249, 252 (1946), the Court has repeatedly "'preclude[d] the application of [state law] to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" *Healy v. The Beer Institute*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982)). Similarly, in *Barclays Bank PLC v. Franchise Tax Board of California*, this Court stated that "[t]he Due Process and Commerce Clauses of the Constitution . . . prevent States . . . from tax[ing] value earned outside [the taxing State's] borders." 512 U.S. 298, 303 (1994) (brackets in original). *See also Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (state tax must concern "an activity with a substantial nexus with the taxing State" to survive constitutional challenge) (internal quotation marks and citation omitted).

In *BMW*, this Court rejected an Alabama court's attempt to impose punitive damages on the basis of the defendant's business activities in other States. The Court explained that "each State has ample power to protect its own consumers, [and] none may use the punitive damages deterrent as a

means of imposing its regulatory policies on the entire Nation." 517 U.S. at 585. The Court emphasized that "one State's power to impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce, . . . but is also constrained by the need to respect the interests of other States." *Id.* at 571. Consequently, "principles of state sovereignty and comity" dictate "that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," because such punishment would unconstitutionally interfere with the policy choices of other States. *Id.* at 572. To safeguard the autonomy of other States, a punitive damages award therefore "must be analyzed in the light of [in-state conduct], with consideration given only to the interests of [the State's] consumers, rather than those of the entire Nation." *Id.* at 574.

In reaching this conclusion, the *BMW* Court expressly relied on *Healy*, where the Court emphasized "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." 491 U.S. at 335-36 (footnotes omitted). The *Healy* Court had struck down a Connecticut statute that regulated commercial conduct in other States, emphasizing that the Commerce Clause bars "the projection of one state regulatory regime into the jurisdiction of another State." *Id.* at 337. *See also Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (explaining that when a state statute "directly regulates" commerce in other States, the Court has "generally struck down the statute without further inquiry").

2. The courts below blatantly violated these constitutional limits by punishing State Farm for alleged out-of-state activities that had no effect on Utah citizens. Indeed, evidence of State Farm's purported "nationwide" policies and practices served as the fundamental building block of the plaintiffs' claim for punitive damages. The plaintiffs were permitted to introduce massive amounts of evidence concern-

ing State Farm's alleged business practices in Texas, California, Hawaii and other States. *See, e.g.*, Pet. 4 (evidence of practices concerning hurricane insurance in Florida); *id.* (evidence of practices concerning hail damage claims in Colorado). The plaintiffs also succeeded in introducing evidence of *lawsuits* filed against State Farm in other States. *Id.* at 4-5. As the plaintiffs' expert told the jury, "[this] case is about more than what happened in Utah." *Id.* at 4 n.3.

Permitting courts to predicate punitive damage awards on a defendant's alleged conduct in other States, as the Utah courts did here, would allow States to circumvent the Constitution's ban on extraterritorial regulation and punishment and evade this Court's rulings in *BMW* and *Healy*. Although a State plainly has a legitimate interest in "protecting its own consumers and its own economy," *BMW*, 517 U.S. at 572, it has *no* interest—and no authority—to regulate and punish conduct within and affecting only other States. Such punishment amounts to "the application of [state law] to commerce that takes place wholly outside of the State's borders," *Healy*, 491 U.S. at 336 (citation omitted), and is constitutionally forbidden.

Moreover, allowing a State to punish extraterritorial conduct would effectively enable that State to project its laws and establish public policy on a national level, thus overriding the laws of the forty-nine other States in the process. Here, many of State Farm's challenged practices, such as its use of certain adjustments for depreciation or betterment, are perfectly legal in other States. *See, e.g.*, GA. COMP. R. & REGS. r. 120-2-52-.04(2); HAW. REV. STAT. ANN. § 431:10C-313(c). Punishment for this conduct is squarely forbidden by *BMW*, which underscores that a State lacks the "power . . . to punish [a defendant] for [out-of-state] conduct that was lawful where it occurred and that had no impact on . . . its residents." 517 U.S. at 573 (footnote omitted). By imposing punishment for business activities that other States have declared permissible, the Utah court's decision effectively supplants and overrides the considered policy judgments of other States.[3]

It is no answer to say that States may impose extraterritorial punishment for certain types of conduct—such as "fraud" or "negligence"—that are considered wrongful in all fifty States.[4] As an initial matter, highly generalized characterizations of primary conduct are improper bases for imposing specific liability. In *BMW* itself, for example, this Court might have reasoned, but did not, that all States prohibit "deceptive practices." This Court instead chose to focus on the details of the specific type of wrongdoing alleged by the plaintiff. Moreover, the essence of federalism is that States may (and do) elect to address even the same general problems in different ways, balancing the risks and benefits of particular activities in whatever manner is suitable to the particular circumstances of each State. That many States share the same general goals says nothing about the precise con-

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[3] The consequences of permitting a state court to make policy on a national level can be severe. In *Avery v. State Farm Mutual Automobile Insurance Co.*, 746 N.E.2d 1242, 1247 (Ill. App. Ct. 2001) (appeal pending), a nationwide class of plaintiffs alleged that State Farm breached its contracts with its insureds by declining to pay for original equipment manufacturer (OEM) parts, and using less expensive, non-OEM parts instead. An Illinois state court certified a nationwide class and the jury imposed a $1.18 billion award. *Id.* The *Avery* case triggered a media firestorm because the Illinois court had essentially overruled the laws of other States, many of which had reached a carefully considered policy judgment that insurers should be allowed—and in some cases *encouraged*—to use cheaper non-OEM parts in making repairs to motor vehicles as a means of controlling the cost, and broadening the availability, of insurance coverage. According to a contemporaneous report in *The New York Times*, the result of the Illinois decision was to "overturn insurance regulations or state laws in New York, Massachusetts, and Hawaii, among other places," and "to make what amounts to a national rule on insurance." *See* Matthew L. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers*, N.Y. TIMES, Sept. 27, 1998, at A29.

[4] The *Romo* court expressly adopted this rationale, distinguishing a design defect case from a case involving a violation of California's "unique and stringent emission standards." 99 Cal. App. 4th at 1151 n.3.

tours of a particular State's law; indeed, it "frustrates rather than effectuates legislative intent" to assume that "*whatever* furthers" a conceded legislative objective "must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original). It makes little sense to permit one State to punish actors for conduct undertaken elsewhere on the basis of broad and speculative generalizations about the laws of sister States. *Cf. In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (Posner, J.) (impermissible to assume that state laws on particular subjects are substantially identical; federal courts may not enforce "Esperanto" versions of state law).[5]

Imposing punishment for out-of-state conduct that is alleged to be uniformly unlawful also infringes on other fundamental presuppositions of our federal system, such as the well-settled rule that one State may not enforce the penal laws of a sister State. This Court has long noted the traditional reluctance of States to enforce one another's penal laws. *See, e.g., Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297-98 (1888). And although this Court once deemed exemplary damages insufficiently "penal" in nature to fall within this general proscription, *see James-Dickinson Farm Mortgage Co. v. Harry*, 273 U.S. 119, 126 (1927), the Court's understanding of punitive damages has changed considerably since 1927.

Indeed, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Court emphasized the many similarities between state criminal laws and modern punitive damages statutes, explaining that punitive damages are "quasi-criminal" and that "[d]espite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion." 532 U.S. 424, 432-33 (2001) (internal quotation marks omitted). *See also id.* at n.11 (recognizing that punitive damages have evolved from serving both compensatory and punitive functions to "a more purely punitive" function today); *Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 281 (1994) ("[t]he very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions"). The Court's recognition that punitive damages today are "quasi-criminal" and that their imposition is subject to many of the same constitutional protections afforded criminal defendants against excessive punishments, *see Cooper*, 532 U.S. at 434-36, provides further evidence that punitive damages are the type of "penal" sanctions that, in our federal system, traditionally have not been enforced extraterritorially.

3. Ford and other automakers are especially vulnerable to unwarranted extraterritorial punishment because they manufacture products that are sold in every State and move throughout the Nation. In products liability litigation, it has become routine for plaintiffs' lawyers to seek to inject evidence of a manufacturer's alleged out-of-state conduct—including evidence of the manufacturer's nationwide profits—as a basis for massive awards of punitive damages.[6]

For example, in *Romo v. Ford Motor Co.*, 99 Cal. App. 4th 1115 (Ct. App. 2002) (petition for review pending), the court expressly relied upon Ford's out-of-state conduct and profits in reinstating a $290 million punitive damages award arising from an accident involving a 1978 Ford Bronco that easily surpassed relevant federal safety standards. The court rejected any suggestion that the Constitution limited its abil-

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5 Permitting a single state court to fashion and then apply an "Esperanto" version of state law to conduct throughout the Nation also risks subjecting national companies to inconsistent regulation. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (stating that this Court has "invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations").

6 As explained in greater detail in Section I.B, basing punitive damages on a defendant's overall "wealth" is objectionable for many reasons, not least of which is the fact that (at least in the case of national corporations) a defendant's "wealth" results from sales in all fifty States.

ity to police out-of-state conduct, asserting that because "the interest California seeks to protect—individual human lives—is neither unique to California nor limited to its own citizens," it could properly consider Ford's aggregate wealth and worldwide profits from the Bronco in determining the amount of the award. *Id.* at 1151 & n.3. The court held that the jury was entitled, based on a single accident, to punish Ford in an amount that was nearly triple Ford's worldwide profits on the 1978 Bronco. Such reasoning, of course, eviscerates the constitutional ban on extraterritorial regulation and amounts to a license for States to interfere with and displace the policy judgments of neighboring States.

Romo and the case at bar illustrate the ease with which a plaintiff can inflame and prejudice the jury, and override *BMW*'s due process principles, by introducing massive amounts of irrelevant evidence concerning a national corporation's alleged business practices in other States. This Court has held, however, that a State's power to impose punitive damages is limited to vindicating its interest in "protecting its own consumers and its own economy," *BMW*, 517 U.S. at 572, and that the Constitution prohibits States from imposing punishment based on out-of-state conduct that has no effect on their citizens.

B. Evidence Of A Defendant's "Wealth" Must Be Linked To The Challenged Conduct

The Utah court further erred by invoking State Farm's alleged wealth and national "profits" as a means of trumping the constitutionally-mandated *BMW* factors. As explained above, basing the amount of a punitive damage award on a company's *national* profits is improper because those profits are almost entirely the product of out-of-state lawful business activities that had no impact on in-state consumers. But reliance on a defendant's overall wealth or profits is improper for an additional reason: Where, as here, there has been no showing that *all* of the company's wealth or profits resulted from the challenged conduct, it is unfair and unconstitutional

to use those numbers as a basis for calculating a punitive damage award.

1. A defendant's wealth cannot by itself justify a heightened penalty. In *BMW*, the plaintiff had argued to this Court that a defendant's aggregate wealth should be part of the constitutional calculus and justified upholding the $2 million punitive damage award. *See* Br. of Respondent at 39, *BMW of North America v. Gore*, No. 94-896 ("The award is also constitutionally justified by reference to BMW's wealth. The evidence showed that even 'the $4 million judgment would not have a substantial impact' on BMW's financial position."). But this Court rejected that argument, declining to adopt the defendant's wealth as a guidepost and declaring: "The fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, [a corporation's] status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce." 517 U.S. at 585.[7]

This Court should eliminate any doubt that *BMW* means what it says: that evidence of a defendant's wealth, to the extent the Constitution even permits it to be considered by the jury, does not trump the three-factor constitutional analysis and salvage a punitive damage award that would otherwise be deemed excessive. As this Court recognized in *Pacific Mutual Life Insurance Co. v. Haslip*, "the factfinder must be guided by more than the defendant's net worth." 499 U.S. 1, 22 (1991). *See also Pulla v. Amoco Oil Co.*, 72 F.3d 648,

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[7] In his concurring opinion, Justice Breyer added that although Alabama permitted the courts to look to the "'financial position' of the defendant" in deciding whether an award was excessive under state law, "[t]his factor is not necessarily intended to act as a significant constraint on punitive awards. Rather, it provides an open-ended basis for inflating awards when the defendant is wealthy." *Id.* at 591 (Breyer, J., concurring) (emphasis omitted).

659 n.16 (8th Cir. 1995) (opinion of retired Justice White, sitting by designation) ("[A] defendant's wealth cannot alone justify a large punitive damages award"); *Continental Trend Res., Inc. v. OXY USA*, 101 F.3d 634, 641 (10th Cir. 1996) ("From the [*BMW*] Court's statements we conclude that a large punitive damage award against a large corporate defendant may not be upheld on the basis that it is only one percent of its net worth or a week's corporate profits.").

In the absence of additional guidance from this Court, many lower courts will continue to treat a large corporate defendant's wealth as a license effectively to disregard the constitutional protections recognized in *BMW*. The instant case is not the only example of this misguided approach. In *Romo*, for example, the court relied upon Ford's profits and net worth as a means of justifying its refusal to apply all three factors of the *BMW* analysis. The court pronounced *BMW*'s comparable penalties guidepost "inapplicable," and proceeded to hold that Ford had been given constitutionally-mandated "fair notice" of a $290 million punitive damage award—which exceeds by over $286 million the largest products liability award ever upheld in California—because it "is a huge company with enormous monetary resources" and should have known that "California regards it as necessary to impose penalties related to the wealth of the defendant in order to achieve the goals of punishment and deterrence." 99 Cal. App. 4th at 1149, 1152.

The court in *Sand Hill Energy, Inc. v. Ford Motor Co.*, No. 1999-SC-1028-SG, 2002 WL 1000917 (Ky. May 16, 2002), similarly concluded that Ford must be deemed to have had "fair notice" of a $15 million award—an amount that *tripled* the largest punitive damage award ever affirmed in Kentucky history. The court stated that "Ford is a multi-national corporation" that "possesses a wealth of information as to settlements, verdicts, and trial and appellate court decisions" and therefore "knew or should have known of the potential for a substantial verdict." *Id.* at *9. *See also Ammerman v. Ford Motor Co.*, 705 N.E.2d 539, 563 (Ind. Ct. App. 1999) (dismissing *BMW*'s "comparable penalties" guidepost as "not

applicable" and ruling that "Ford knew or should have known" of the potential for a $13.8 million punitive damage award "given that Ford's economic wealth ($219 billion in total assets, $21.7 billion in net worth, and $5.3 billion in net profits) is a factor to be considered in assessing punitive damages.").

This type of reasoning amounts to an end-run around *BMW* and the Due Process Clause by automatically deeming large corporations to have had "fair notice" of virtually *any* monetary punishment that a jury conceivably could impose. Subjecting national corporations to open-ended punishment solely because of their financial status is plainly improper and threatens to nullify the constitutional safeguards on punitive damage awards that this Court has repeatedly recognized.

2. The Utah courts further erred in their reliance on "wealth" evidence by looking to State Farm's *overall* profits, rather than the profits directly resulting from the alleged misconduct. Allowing a jury to consider a large corporation's overall wealth is a recipe for a punitive damage award that is grossly disproportionate to the challenged conduct. This Court should make clear that a punitive damages award—to the extent that it may be supported by reference to a defendant's wealth or profits *at all*—must be directly linked to the wealth or profits that are shown to have resulted from the alleged wrongdoing. In other words, a punitive damages award must closely reflect the precise amount of the wrongful gain, and be reduced by any compensatory damage award arising from the challenged conduct.

In *Cooper*, this Court expressly recognized that a punitive damages award must, at the very least, be tethered to the profits generated by the misconduct at issue. In that case, the plaintiff sued for unfair competition, alleging that the defendant improperly used a photograph of the plaintiff's product in marketing its own competing product. 532 U.S. at 427-28. The plaintiff premised its request for punitive damages not on the defendant's overall profits, but only on its anticipated

profits from the sales of the competing product. *Id.* at 442. The Court, however, explained that even that measure was too broad because "it would be unrealistic to assume that all of [the defendant's] sales . . . would have been attributable to its misconduct," adding that the defendant's "wrongdoing surely could not be treated as the principal cause of [the defendant's] entire sales volume for a 5-year period." *Id.*

Limiting consideration of wealth evidence to the profits generated by the specific misconduct comports not only with due process, but with the purposes of punitive damages, which are "to punish the defendant and deter future wrongdoing." *Id.* at 432. To the extent that punitive damages serve a retributive purpose, "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Solem v. Helm*, 463 U.S. 277, 284 (1983). Consequently, "[t]he amount of the [punishment] must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). And to the extent that a punitive damages award serves to deter future wrongdoing, closely linking the punishment to the profits from the specific misconduct avoids the risk that corporations will be deterred from engaging in socially beneficial activities altogether. *See In re the Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001) ("Every large company knows that it cannot exercise absolute control over all its employees, so if there is too much risk in performing some activity, the entire activity may be avoided as a preferable alternative to bearing potentially infinite costs of avoiding the harm, and society would lose the benefit of the productive activity.").

3. Basic constitutional principles also require that juries be restricted to considering only those profits resulting from *in-state* economic activity. Permitting a State to impose punishment based on a corporation's profits from business activities in another State risks subjecting the defendant to multiple and duplicative penalties for the same conduct. Were every State to follow the Utah courts' approach and calculate punitive damages based on a company's *national* wealth and

profits, defendants could be forced to pay fifty "nationwide" penalties for a single course of conduct.

It is this very danger of multiple assessments that has led this Court to apply the Due Process and Commerce Clauses to bar States from disproportionately taxing income generated from interstate business activities. In *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989), for example, this Court underscored the need "to ensure that each State taxes only its fair share of an interstate transaction." And in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, the Court explained that "[t]his principle of fair share is the lineal descendent of [this Court's] prohibition of multiple taxation, which is threatened whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of value by which one State exceeded its fair share would be taxed again by a State properly laying claim to it." 514 U.S. 175, 184-85 (1995). These principles apply equally to a State's attempt to impose punitive damages on the basis of a company's purported "nationwide" profits.

II. JURIES MUST BE INSTRUCTED TO OBEY THESE CONSTITUTIONAL RULES

To give the constitutional limitations on punitive damage awards real meaning, trial courts must instruct juries to observe these limitations when determining punitive damages. In the absence of such instruction, juries will continue to exceed the limits of their discretion under the Commerce and Due Process Clauses by punishing out-of-state conduct and by boosting the amounts of punitive awards based on the defendant's national financial status. Indeed, this Court has repeatedly underscored the important role proper jury instructions play in protecting federal rights and promoting fairness in the imposition of verdicts, sentences and damage awards in criminal and civil cases alike.

A. This Court Has Long Recognized The Importance Of Jury Instructions As A Way Of Protecting Federal Constitutional Rights

1. In both criminal and civil cases, this Court has held repeatedly that proper instructions are crucial to ensure that jury verdicts are consistent with constitutional limits on state authority. In *Taylor v. Kentucky*, for example, this Court held that a Kentucky court had erred in not instructing the jury on the presumption of innocence, a constitutional safeguard required by due process. 436 U.S. 478 (1978). In rejecting the argument that no instruction was required because counsel had argued the point, this Court explained that "[i]t was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably." *Id.* at 489; *see also Carter v. Kentucky*, 450 U.S. 288, 304 (1981) ("[M]ost certainly, defense counsel's own argument . . . cannot have had the . . . effect that an instruction from the judge would have had.").

Similarly, in *Cabana v. Bullock*, this Court held that "a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof." 474 U.S. 376, 384 (1986); *see also Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 436 (1972) (holding that jury instructions failed to require proof of the essential element for conviction, which was plain error). And in *Beck v. Alabama*, this Court held that juries must be instructed on any lesser-included offenses that are supported by the evidence. 447 U.S. 625, 641 (1980). Indeed, as demonstrated by a long list of capital punishment cases, this Court has consistently required that jury instructions must clearly reflect the limitations that the Constitution places on jury discretion. *See, e.g., Simmons v. South Carolina*, 512 U.S. 154, 163-64 (1994) (plurality opinion) (where a State makes "future dangerousness" relevant to capital sentencing, due process requires that the jury be informed that life sentence would render defendant ineligible for parole); *id.* at 172-73 (Souter, J., concurring) (defendant has a "right to require instructions on the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider"); *see also Stringer v. Black*, 503 U.S. 222, 237 (1992) (permitting jury to "[u]se . . . a vague or imprecise aggravating factor in the weighing process invalidates the sentence").

This Court has followed a similar course in civil cases. In *Monitor Patriot Co. v. Roy*, for example, this Court found fault in a trial court's instruction to the jury on the issue of whether information on a political candidate's criminal past was "relevant." 401 U.S. 265 (1971). This Court held that the flawed jury instruction, "and others like it, left the jury far more leeway to act as censors than is consistent with protection of the First and Fourteenth Amendments in the setting of a political campaign." *Id.* at 275. Similarly, in *Harte-Hanks Communications, Inc. v. Connaughton*, this Court held that "[b]y instructing the jury 'in plain English' at appropriate times during the course of the trial concerning the not-so-plain meaning of [the phrase 'actual malice'], the trial judge can help ensure that the *New York Times* standard is properly applied." 491 U.S. 657, 666 n.7 (1989) (citations omitted); *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991) ("But the term [actual malice] can confuse as well as enlighten. . . . In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.").

In sum, in both the civil and criminal context, this Court has held repeatedly that clear and detailed jury instructions are indispensable to ensuring that jury discretion is confined within constitutional bounds, particularly when juries are empowered to impose punitive sanctions.

2. The same need to confine jury discretion within appropriate limits requires that juries be instructed on governing constitutional principles in punitive damages cases. As this Court has emphasized, jury instructions are "a well-established and, of course, important check against excessive awards." *Oberg*, 512 U.S. at 433; *see also Bankers Life &*

Cas. Co. v. Crenshaw, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part and concurring in judgment) (noting that a court's failure to give the jury proper standards for imposing punitive damages "appears inconsistent with due process").

Indeed, this Court's decision in *BMW*, which expressly articulated for the first time certain due process limits on punitive damage awards, was but the culmination of a series of cases in which Members of this Court recognized that juries were being told "little more than . . . to do what they [thought] [wa]s best" and thus were being "left largely to themselves in making this important, and potentially devastating, decision." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring); *see also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 474 (1993) (O'Connor, J., dissenting) (noting that "the risk of prejudice, bias and caprice" in jury decisions involving punitive awards was especially high because "juries sometimes receive[d] only vague and amorphous guidance"). It was precisely the danger of "extreme results" that arose from that "unlimited judicial discretion . . . in the fixing of punitive damages," *Haslip*, 499 U.S. at 18, that ultimately led to this Court's seminal decision in *BMW*.

Despite this Court's guidance, trial courts have continued to give juries the same types of skeletal, uninformative guidance that is most likely to lead to the constitutional violations that concerned this Court in *BMW*. For example, the Supreme Court of Kentucky recently upheld a $15 million punitive damage award despite the fact that "the trial judge gave the jury a punitive damages instruction that did not define the purpose of punitive damages in any respect but simply afforded the jury an unfettered avenue by which to award the [plaintiff's] estate an unlimited amount of additional compensation." *Sand Hill*, 2002 WL 1000917, at *23 (Cooper, J., dissenting). This constitutionally infirm instruction was given, moreover, over the defendant's objection. As the dissenting justice on the Supreme Court of Kentucky noted, "[t]he instruction on punitive damages obviously did not comply with Due Process requirements." *Id.*

The *Sand Hill* court attempted to justify its refusal to issue the requested jury instruction by underscoring that "the giving of 'bare-bones' instructions" is a "venerated practice" in Kentucky, and that "counsel for the [plaintiff] reminded the jury time and again that the purpose of punitive damages was to punish wrongdoing." *Id.* at *7. But this precise rationale was rejected in *Taylor v. Kentucky*, where this Court held Kentucky's "skeletal" and "rather Spartan" jury instructions insufficient to protect the defendant's constitutional rights, and specifically noted that although the lawyers' arguments may have conveyed the substance of the requested charge to the jury, "arguments of counsel cannot substitute for instructions by the court." 436 U.S. at 488-89. *See also Carter v. Kentucky*, 450 U.S. at 304 (holding Kentucky court's jury instruction constitutionally deficient and concluding that "[t]he other trial instructions and arguments of counsel that the [defendant's] jurors heard at the trial of this case were no substitute for the explicit instruction that the [defendant's] lawyer requested").

States may not delegate to juries the power to punish under instructions that leave those juries without relevant legal guidance, and that accordingly fail to protect defendants' constitutional rights. In the punitive damages sphere—as in other areas of criminal and civil litigation—it is essential that juries be specifically advised of the limitations that the United States Constitution imposes on their authority.

B. Juries Must, At A Minimum, Be Instructed On The Proper Purposes Of Punitive Damages, The Limits On The Jury's Power To Punish Out-Of-State Conduct, And The Limited Role Of "Wealth" Evidence

Due process requires that the jury receive, at a minimum, instructions on three constitutional limitations to punitive damage awards. First, the jury must be instructed on the purposes of punitive damages. Second, the jury must be instructed that it may consider only the in-state conduct of the

defendant. And third, the jury must be instructed on the proper consideration of wealth evidence.

First, due process requires that the jury be instructed that its "discretion" to award punitive damages is "confined to deterrence and retribution, the state policy concerns sought to be advanced." *Haslip*, 499 U.S. at 19; *see also BMW*, 517 U.S. at 568 (holding that punitive awards should be confined to a State's legitimate interests in punishment and deterrence); *Oberg*, 512 U.S. at 429 (holding that the law requires that there be "evidence to support the amount [of punitive damages] actually awarded"). Unless first instructed that they must link a punitive damage award to specific purposes, juries will possess unlimited discretion and be likely to impose damage awards that do not satisfy the State's interest in "*appropriate* deterrence and retribution." *Haslip*, 499 U.S. at 20 (emphasis added). Jury instructions, on the other hand, that properly "enlighten[ ] the jury as to the punitive damages' nature and purpose, identif[y] the damages as punishment for civil wrongdoing of the kind involved, and explain[ ] that their imposition was not compulsory" will rein in the jury's discretion and "reasonably accommodat[e] [the defendant's] interest in rational decisionmaking." *Id.* at 19-20.[8] Without proper instructions on the intended purposes

[8] The Third Circuit already has held that federal common law requires a "reasonable relationship" instruction. *See Levinson v. Prentice-Hall, Inc.*, 868 F.2d 558, 564 (3d Cir. 1989); *see also Baker v. General Motors Corp.*, 86 F.3d 811, 818 (8th Cir. 1996) (holding that where "there was neither any guidance for the jury nor any restraint on its discretion in awarding punitive damages . . . . [t]his lack of guidance rendered the jury instructions unconstitutionally vague and violated GM's right to due process"), *rev'd on other grounds*, 522 U.S. 222 (1998); *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1415, 1418 (4th Cir. 1992) (en banc) (holding that Virginia punitive damage charge was unconstitutional, because the jury must be instructed that punitive damages must be proportional to compensatories); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 100-01, 110 (4th Cir. 1991) (holding that South Carolina punitive charge was unconstitutional and ordering that on remand, the jury be instructed, *inter alia*, that "any penalty imposed should bear a relationship to the

punitive damages serve, it is illogical to expect a jury to make a reasoned decision as to the "appropriate" level of punishment.

Second, due process requires that the jury be instructed that the defendant cannot be punished for conduct that occurred outside the State. As explained above, this Court has held that punitive damages can only be imposed to the extent that a State's legitimate interests will be served. All of a State's legitimate interests, however, are confined to "protecting [a State's] own consumers and its own economy." *BMW*, 517 U.S. at 572. Thus, a State lacks the "power . . . to punish [a defendant] for [out-of-state] conduct that was lawful where it occurred and that had no impact on . . . its residents." *Id.* at 573 (footnote omitted). Unless first instructed that they must confine any punitive damage award to the interests of the citizens of their State, juries are likely to impose damage awards that are "grossly excessive." *Id.* at 568.

Finally, punishment should be proportionate to the gravity of the alleged transgression, not to the defendant's wealth. *See, e.g., Haslip*, 499 U.S. at 19, 22 ("[T]he factfinder must be guided by more than the defendant's net worth."); *Solem v. Helm*, 463 U.S. 277, 284 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."). This Court also has recognized the "potential that juries will use their verdicts to express biases against big businesses," *Oberg*, 512 U.S. at 431, and that this risk "is of special concern when the defendant is a nonresident," *TXO*, 509 U.S. at 464 (plurality opinion). *See also* 2 American Law Institute, *Reporter's Study: Enterprise Responsibility for Personal Injury* 254-55 (1991) ("In determining the size of the award that is sufficient for [deterrence], what is relevant is not the defendant's overall wealth, but rather the profit it realized from the particular tortious activity in question.") (emphasis

[Footnote continued from previous page]

nature and extent of the conduct and the harm caused, including the compensatory damage award").

omitted). Because "[j]ury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences," *Oberg*, 512 U.S. at 432, due process requires that juries be instructed on the proper role, if any, the defendant's wealth can play in their determinations of punitive damage awards.

In addition to protecting the defendant's due process rights, instructing juries on the constitutional limits on punitive damage awards will benefit the courts and the public by producing more consistent and reliable damage awards. Proper jury instructions will serve to educate both juries and the courts as to the constitutional boundaries. *See Cooper*, 532 U.S. at 436 ("'Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself.'") (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)). Proper jury instructions will also help eliminate the need for appellate courts to speculate whether a punitive damages award was based on impermissible considerations. For these reasons, guidance by this Court on this issue is necessary to protect defendants' constitutional rights and ensure the uniform application of law.

CONCLUSION

For the foregoing reasons, the judgment of the Utah Supreme Court should be reversed.

Respectfully submitted.

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